(3)

00-1205

No.

Supreme Court, U.S.
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In the

Supreme Court of the United States

GARY L. WEBB and MELISSA L. WISNER,

Petitioners,

v.

BOARD of TRUSTEES of BALL STATE UNIVERSITY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

A. Respondents do not contest Petitioners' assertion that the Court of Appeals failed to conduct a *de novo* examination of the record.

In their Brief in Opposition, Respondents do not challenge Petitioners' claim in their Petition for Certiorari (Pet. 10-16) that the record clearly establishes that the Court of Appeals failed to conduct the requisite *de novo* review of the record in this cause.[1] They merely argue that the Court of Appeals "did not need to order the record." (Br. Opp. 15), because there was no "specific indication by the Petitioners of those parts of the record they believed were misapprehended by the District Court" (Br. Opp. 15),[2] but cite no authority establishing an exception to the rule requiring *de novo* review of the record in appeals from summary judgments. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1985) (*de novo* review requires review of the record taken as a whole); *Haefling v. United Parcel Service*, 169 F. 3d 494, 497 (7th Cir. 1999) ("We review the

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[1]R. 175 is the mandate and the accompanying cover letter indicating no record was being returned because none was sent. Petitioners timely filed their Designation of Record on appeal pursuant to local Rule 76.1. (R. 165). Circuit Rule 11(a) provides in relevant part that records from all District Courts except those in the Northern District, Eastern Division, "are to be temporarily retained by the district court clerk's office pursuant to Rule 11(c). . . After the appeal is ready for scheduling for oral argument or submission, *the clerk of the court of appeals will notify the district court clerk to transmit the record to the court of appeals*." (Emphasis added). The record shows no such notification was received by the District Court clerk.

[2]This Court can determine for itself whether the number and quality of the issues raised in both Petitioners' papers filed in the District Court in opposition to Respondents' dispositive motions (e.g., R. 150, R. 87, 195, 197, 108) and their brief on appeal below were sufficient to raise genuine issues of material fact. The issue before this Court, however, is whether the Court of Appeals conducted a proper *de novo* review of the record, not whether this Court should deny the Writ of Certiorari because the Court of Appeals may have guessed correctly (without examining the record) that the District Court properly granted summary judgment for Respondents.

district court's grant of summary judgment *de novo*, drawing our own conclusions of law and fact *from the record before us*") (emphasis added); *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991) (where *de novo* review is compelled, no form of appellate deference is acceptable); *Tobey v. Extel/JWP., Inc.*, 985 F. 2d 330, 332 (7th Cir. 1993) (*de novo* review in summary judgment is conducted "without deference for the view of the district Judge and hence almost as if the motion had been made to us directly"). These principles were honored in the breach in this case. What makes the Court of Appeals' failure to conduct any examination of the record even more egregious is not only its flagrant disregard of this Court's precedents, but the fact that it claimed to have "the briefs *and the record*" (emphasis added), (App. 1a), and its failure to in fact do so was done in the context of a case in which Petitioners had specifically argued that the District Court in its opinion had *itself* (a) disregarded six days of live testimony, (b) had struck portions of affidavits on certain grounds that would have been admissible on other grounds, (c) had disregarded a 13-page affidavit to which no objections had even been filed, (Pet. 8-9, 25-26), and (d) had struck certain statements of genuine issues as conclusory, where they contained specific references to the record reciting the adverse actions taken by Respondents against Petitioners. (Pet. 26, n. 12). Thus, the Court of Appeals' failure to examine the record in this case compounded the injustice of the District Court's own failure to take cognizance of all the evidence in the record. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Nor do Respondents address the significant policy implications (Pet. 16) of permitting Courts of Appeals in our judicial system to dispense with an examination of the record, i.e., the denial of litigants' Seventh Amendment right to trial by jury. This Court should ensure, through the exercise of its supervisory power, that the Seventh Circuit and every other Court of Appeals provide Petitioners, and all other appellants and appellees, a full and fair opportunity to have their appeals from a grant of summary judgment considered by an actual review of the record. Courts of Appeals cannot be permitted to act as a rubber stamp or "judicial echo" of District Courts. The "summary judgment of a summary

judgment" that took place here is not what the framers of the Constitution contemplated when they adopted the Seventh Amendment, nor what Congress or this Court contemplated when Rule 56 of the Federal Rules of Civil Procedure was adopted for civil litigation. This is what justifies this Court's exercise of its supervisory power in this case.

B Correction of Respondents' statement of facts reveals the inferences from the evidence favorable to Petitioners to which they were entitled, but which they were denied.

Petitioners seek a Writ of Certiorari to vacate the opinion of the Court of Appeals and remand this case to that court with instructions that it conduct an actual *de novo* examination of the record in this cause. Therefore, a review of all the facts of this case is unnecessary, which is why Petitioners' merely described them with a broad brush in their Petition for Certiorari. (Pet. 2-4). However, Respondents' chose in their Brief in Opposition to provide a detailed yet incomplete and inaccurate account of the facts. For example, Respondents' description of Webb's April, 1994, report of a sexual harassment complaint of a student against Dr. Meagher and the University's handling of it by his former girlfriend and assistant vice-provost Wynola Richards (Br. Opp. 1-3) implies Webb was unreasonably insisting on Meagher's immediate termination. Respondents fail to mention that Webb had, eight months earlier (September, 1993), passed on to Richards the first complaint against the same professor (Meagher). (R. 111, 723-725). After Webb and Richards' breakup in late 1993, (R. 111, 726), Respondents Johnstone and Vander Hill, took a series of adverse administrative actions against his department. ((R. 111, 727, 730). Richards then refused to act on Webb's second student sexual harassment report received regarding Meagher in April, 1994, stating in a memorandum to Webb that the complaint, alleging Meagher's requests for fellatio in his office, was in her view and that of legal counsel (Respondent Moll) not sexual harassment. (R. 111, 734-735). After Webb met with her, she took back the memorandum,

and referred the complaint to the AF & E (Academic Freedom & Ethics) Committee. (R. 111, 735). As to Webb's purported refusal to appear before the AF & E Committee in his own defenseon Cotlar complaint, Respondents fail to note that his complaint was made on the heels of Webb's report (made with the support of the entire faculty) of Cotlar's misconduct, which included his refusal to teach an assigned course. (R. 111, 744-745).[3] Webb had Bell's Palsy (making speaking difficult) when the AF & E Committee meeting was scheduled. His request for a continuance due to his condition was ignored, and the committee conducted its hearing – and rendered its adverse decision – without him. (R. 111, 758).[4] Contrary to Respondents' claim that Webb's communications regarding the misconduct he observed at the University were purely internal (Br. Opp. 17), he testified that he communicated to various external governmental officials, (R. 113, 914-915), not to mention having filed his EEOC complaints. (R. 1, Exhibits 1-3). Respondents' description of the members of the Ad Hoc Committee established by the Board of Trustees and the president (Respondent Worthen) to consider Webb's June, 1995, complaint as "distinguished tenured faculty" (Br. Opp. 6) is belied by the testimony of former defendant Richards, who testified that it was "common knowledge" (R. 113, 829) in administrative circles that this committee was established as Webb's "firing squad." (R. 113, 829, 836-837). The committee consisted of administration loyalists, i.e., faculty who, according to Richards, are placed on committees by administrators, know how they want them to vote, and who vote that way. (R. 113, 844). She admitted having lied herself to an AF & E Committee about her affair with Respondent Vander Hill, at his urging. (R. 113, 849). In fall, 1996, Webb's department colleagues (except Sayles) joined the loyalist camp by conducting a "relentless

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[3]Instead of taking remedial action, Respondent Johnstone, over Webb's and the entire faculty's objection, permitted Cotlar to be paid for teaching the assigned course, but said that he didn't have to teach it. (R. 111, 745-757).

[4]The undisputed testimony, supported by a transcript of a telephone conversation between Webb and Airries, was that Airries, admitted to Webb that he was "just a soldier in the army here. And I'm just doing what's asked of me." (Respondents' Exhibit 85, transcript of January 18, 1995, at 4).

campaign"[5] of harassment against him and other reporters of sexual harassment and discrimination in the department, i.e., Petitioner Wisner and former plaintiff Sayles, to further their own personal and financial interests.[6] Respondents' brief mentions Dean Johnstone's receipt of a memorandum dated November 4, 1996, from six departmental faculty requesting that the dean remove Webb as chairperson. (Br. Opp. 7). Respondents conveniently omit the fact that this was a secret 6-page memorandum requesting that Webb be removed as chair, that Sayles be removed as assistant chair, and that Wisner be removed as administrative coordinator, to which Petitioners had no opportunity to respond. (R. 113, 927). That memorandum was followed immediately by three others from Respondents Hendricks, Ho, and Byers to Johnstone alleging misconduct on the part of Petitioners, to which they were also never given an opportunity to respond. (R. 63, Exhibit 2-P). These secret memoranda were used by Johnstone as the basis of his February 17, 1997, letter to Respondent Vander Hill asking for Webb's removal as chairperson. (R. 63, Exhibit 2-U). Johnstone admitted under oath that he never contacted Webb to ascertain the truth of these memoranda (R. 110, 488), and that he never took any action in response to Petitioners' allegations complaining of sexual harassment and retaliation by certain Respondent faculty

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[5]See *Knox v. State of Indiana*, 93 F. 3d 1327, 1335 (7th Cir. 1996), where such a campaign was found actionable.

[6]Aside from Webb's March, 1997, removal as department chairperson and the plastering of his personnel file with a barrage of memoranda containing false and defamatory accusations (R. 113, 1002), the most blatant adverse actions were, and continue to be (a) Respondents Hendricks' contravention of the established entitlement of tenured Ball State University faculty to teach in their areas of specialization, as established by the uncontraverted testimony of four present or former department chairs (R. 109, 314, 318-319, 328-329, 336-341, 352, 356-357, 362, 364, 366, 370, 374-375, 381-383, 385-386, 399, 403-404) and Respondent Provost Vander Hill himself (R. 109, 244-246), and (b) unjustifiably poor performance evaluations by Respondents Hendricks and Brown that resulted in denial to Webb of any raises (allowing his colleagues to split monies that would otherwise have been used for his raises), summer teaching assignments, and compensation for teaching correspondence courses. (R. 132, 133).

members. (R. 110, 481-484). The District Court and the Court of Appeals, in accepting *in toto* Respondents theory of the case, i.e., that Petitioners had caused a "meltdown" of the department, usurped the role of the jury by making credibility judgments and weighing the evidence. The aforementioned secret "concerned faculty" letter of November 4, 1996 (R. 64, found between Exhibits 6F and 6G) to Johnstone asking for Petitioners' removal came three days after former plaintiff Sayles' November 1, 1996, complaint of sexual and non-sexual harassment by Respondent Hendricks and Ho. Four days later these faculty and two other Respondents also filed false and secret countercharges against her and both Petitioners with the university affirmative action office. (R. 64, Exhibits 6D, 6E, 6G, 6H). Respondents' contention that Petitioners never availed themselves of the opportunity to respond to those (counter)complaints (Br. Opp. 7) omits evidence establishing that Petitioners refused to appear at the affirmative action office until they were first informed of the specific charges against them, and were given the procedures to be followed in such matters, neither of which did the affirmative action officer, Respondent Sali Falling, provide them. (R. 113, 948-952; R. 114, 1155-1159). Respondents' assertion that Webb had not cooperated with Respondent Johnstone's July, 1997, directive "to ensure an orderly transition" of chairpersons (Br. Opp. 8) omits the fact that the directive in question was one requiring that Webb cancel a summer, 1997, course schedule that he had previously submitted to – and which was approved by – Johnstone, and that Johnstone wanted it changed in violation of university regulations to accommodate a belated request for certain coveted course assignments (i.e., supervising student internships) sought by Respondents Hendricks and Byers.[7] Three days after the state

[7]Webb testified these loyalist faculty had never been promised these internship assignments, that he never saw their memoranda to Johnstone complaining about his handling of this issue, and that it was his prerogative as chairperson under university regulations to make teaching assignments as he saw fit (R. 113, 956-976; R. 114, 1058-1069). A state court judge agreed and granted him a temporary restraining order on February 14, 1997, against Dean Johnstone and other university administrators, prohibiting them from changing the summer schedule and engaging in any retaliation against him (and Sayles). (R. 113, 978-979). Respondents immediately violated the TRO and posted a new

court on February 14, 1997, granted a TRO in Webb's favor regarding the summer schedule dispute, defamatory letters were received by the Muncie and university newspapers falsely accusing Webb of a sex-for-grades scandal, which they investigated and found groundless. (R. 113, 980). Webb identified the handwriting on one of the envelopes as Respondent Hendricks'. (R. 113, 989). The day after Webb filed his second EEOC complaint on March 10, 1997, a friend and popular adjunct faculty member (Dave Morris) was told by Hendricks that his contract would not be renewed because of his relationship with Webb. (R. 109, 130-135). Immediately thereafter, according to student Ryan Loy's testimony, Respondent (part-time instructor) Jean Comley, another loyalist, learned Loy was circulating a petition opposing Morris' firing. She thereupon threatened Loy by telling him that to do so would not be in his best interest, so he stopped collecting student signatures on the petition. (R. 109, 117). Thirty days after filing of the Complaint in August, 1997, and to date, Respondent Hendricks, as the new chairperson, assigned Webb to teach three courses outside his areas of specialization without any stated *or* pretextual justification. (R. 113, 1008-1009). Petitioners, as nonmoving parties in summary judgment, were entitled to – but did not receive – the reasonable inferences in their favor that can be drawn from all of the foregoing evidence. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990).

C. Respondent state officials, protected from discovery by *Harlow v. Fitzgerald*, are estopped from attributing delay in discovery to parties complying with the rule in that case.

Why would Petitioners (or any other litigant), as

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course schedule that accommodated Hendricks and Byers, thereby disrupting the normal process of student class scheduling. (R. 112, 987; R. 113, 1074). Webb filed his second EEOC complaint on February 26, 1997 (R. 112, 990), and seven days later, on March 5, 1997, he received his notice of removal as chairperson of the department. (R. 113, 991). On the same day as his removal, Wisner was transferred to another position in another unit, with significantly different responsibilities. (R. 114, 1186-1188).

Respondents argue, pursue "a conscious strategy to oppose summary judgment motions by submitting their own view of events instead of conducting discovery from Respondents" (Br. Opp. 20) if discovery was available? The simple answer is that discovery was not available; Respondents, as governmental officials, were beneficiaries of the prohibition upon discovery before a court ruling on their qualified immunity defense as this Court declared in *Harlow v. Fitzgerald.* 457 U.S. 800 (1982). Had Petitioners initiated discovery immediately upon filing suit, Respondents would most assuredly have sought immediate sanctions or a protective order. Thus, Respondents are estopped from, on the one hand, benefitting from the *Harlow* prohibition upon discovery, and, on the other hand, asserting that compliance with *Harlow* constitutes delay in conducting discovery that is attributable to Petitioners.[8] Their claim that Petitioners had ample opportunity to conduct discovery during the first 2 ½ months after

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[8]The District Court's also suggested Petitioners' should have violated *Harlow* (as it was interpreted before *Crawford-El*) and conducted discovery in the months after filing the Complaint and before Respondents even filed their first pleadings. (App. 107a-108a). Petitioners did not have the "sufficient discovery" that the parties had in *Williams v. National R.R. Passenger Corp.*, 167 F. 3d 1059, 1063 (7th Cir. 1998), cited by Respondents, nor did they fail to review documents that had been made available in the discovery process after being given extra time to do so, as in the second case Respondents cite on the Rule 56(f) issue. *United States v. All Assets, etc.*, 58 F. 3d 1181, 1190 (7th Cir. 1995). Petitioners never had *any* discovery because they were complying with the dictates of *Harlow v. Fitzgerald.* Respondents' cases in support of their contention that the request for limited discovery under *Crawford-El v. Britton*, 523 U.S. 574 (1998), was waived because that case was not cited in Petitioners' Rule 56(f) motion (i.e., *Jenkins v. Anderson*, 447 U.S. 231, 234 (1980) and *Dorszynski v. U.S.*, 418 U.S. 424 (1974)) are inapposite. (Petitioners did cite other lower court authorities in support of their Rule 56(f) request (Pet. 7 n. 4)). The facts in Respondents cases (a) arise in the habeas corpus context, which is governed by strict rules regarding prisoners' obligations to first raise constitutional issues in their state trial court, which is not the context here, and (b) rest upon an interpretation of *Wainright v. Sykes*, 433 U.S. 72 (1977), another habeas case. *Jenkins* in fact supports Petitioner's case by holding that a claim of waiver can *itself* be waived, which happened here; Respondents failed to file any objection to Petitioners Motion to Lift Stay and for Other Relief (R. 147), in which Petitioners made their Rule 56(f) request).

filing of their Complaint before responsive pleadings were filed is equally fanciful. (Br. Opp. 20). Petitioners granted Respondents the professional courtesy of not objecting to an enlargement of time within which to plead, and Respondents took advantage of that courtesy and did not file their dispositive motions until October 15, 1997 (R. 59-64) and October 29, 1997. (R. 72-75). It is disingenuous for Respondents to now suggest that Petitioners should have engaged in discovery while awaiting Respondents' first pleadings, where is common practice to await receipt of responsive pleadings before conducting any discovery.

D. Respondents do not contest Petitioners' claim that in this case strict enforcement of the District Court's Local Rule 56.1 governing summary judgment practice violates Fed. R. Civ. P. 83(A)(2).

Respondents do not contest Petitioners' claim that strict enforcement of the District Court's local summary judgment Rule 56.1, under the facts of this case, "cause[d] a party to lose rights because of a nonwillful failure to comply with the requirement," in violation of Fed. R. Civ. P. 83(a)(2).[9] Petitioners agree that District Courts should not have to scour the record to find genuine issues of fact. But this principle assumes the court will have to wade through numerous unfamiliar depositions and other discovery material. Here, however, there was no discovery, the District Court heard six days of testimony, took notes during the hearing, was provided a time line and exhibit list by Petitioners with which to follow that testimony, heard witnesses identify and describe the significance of most of the documents the parties introduced into evidence, and then wrote an 87-page opinion about the case. To mandate perfect crafting of statements of

[9]The example given was the statement in Petitioners' Third Amended Statement of Genuine Issues which stated: "Whether plaintiff Webb and those who supported his opposition to misconduct, nonfeasance, and sexual harassment of students (i.e., plaintiffs Sayles and Wisner) were retaliated against by the defendants." (R. 150, ¶ 4). It was stricken as "overly broad, general, and conclusory," (App. 28a), but it was supported by numerous references to the record evidencing adverse actions taken against Petitioners.

genuine issues per a local rule, and ignore specific references to the record in support of such statements in the context of a case in which the court was intimately familiar with the facts is to raise form over substance, returns us to an era of common law pleading, denies Petitioners' and other similarly situated litigants' right to trial by jury, and is another departure from accepted and usual judicial proceedings in the summary judgment context, requiring this Court's exercise of its supervisory power.

Conclusion

For the foregoing reasons, Respondents' arguments should be rejected, and the Writ of Certiorari should be granted to vacate the decision below and remand the case for a proper *de novo* examination of the record.

Respectfully submitted,
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